

DELTA PROTECTION COMMISSION

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DRAFT



Minutes of the Meeting of the Delta Protection Commission
Thursday, April 25, 1996

1. Call to Order/Roll Call.

The meeting was called to order at 7:15 p.m. Commissioners present were: Calone, Ferreira, Freeman, Herendeen, McCarty, Nottoli, Potter, Salmon, Sekelsky, Thomson, Torlakson, and Yates. Commissioners absent were: Broddrick, Fargo, McGowan, Mello, Murphy, and Simas.

2. Public Comments.

There were no public comments.

3. Minutes of March 28, 1996 Meeting; April 4, 1996 Public Hearing and April 8, 1996 Public Hearing.

On a motion by Commissioner Ferreira and a second by Commissioner Herendeen, the draft minutes of March 28, 1996 were approved by voice vote. On a motion by Commissioner Potter and a second by Commissioner Torlakson, the draft minutes of the April 4, 1996 public hearing were approved by voice vote. On a motion by Commissioner Ferreira and a second by Commissioner Herendeen, the draft minutes of the April 8, 1996 public hearing were approved by voice vote.

4. Chairman's Report.

Chairman McCarty reported that the next meeting of the Delta Protection Commission is scheduled for Thursday, May 23, 1996 in the Jean Harvie Community Center at 6:30 p.m.; a Budget and Finance Subcommittee Meeting is scheduled for Wednesday May 1 at 4 p.m. at the McCarty Company in Stockton. He announced that a closed session was held before the regular meeting and that the Commission took no action in the closed session. He reported that John Banuelos, the Director of the Department of Boating and Waterways, had removed Bill Curry as the Department's representative. He noted the Western Railway Museum is once again running the Wildflower Express to Jepson Prairie Preserve.

5. Attorney General's Report.

There was no Attorney General's report.

6. Executive Director's Report.

Margit Aramburu reported SB 1673, the bill to extend the Commission, was approved by the Senate Committee on Natural Resources and Wildlife and is scheduled before Senate Appropriations Committee on April 29; the SWRCB held a workshop on the San Luis Drain and will receive a staff report in early June; as of the end of March, the Commission's 10% penalty fund contained \$1,548.89; she explained a map of seasonally flooded areas in the Primary Zone; and reported on attending three of the eight CALFED scoping meetings on the ten preliminary project alternatives. A briefing by CALFED staff is tentatively scheduled for the May Commission meeting.

7. Pending Projects Memo.

There were no questions or comments on the pending projects memo.

8. Commission Consideration and Possible Request to Attorney General to File "Friend of the Court" Brief with California Supreme Court in Akins vs. People of the State of California (No. 3 Civ. C015891).

Richard Frank said he had mentioned the case last month and several Commissioners had requested that consideration be agendized. Several months ago the appeals court upheld a judgement imposing liability of over 11 million dollars on the State of California, Reclamation District 1000, and the American River Flood Control District as a result of flooding in 1986. The court's decision was based on legal theories that may be inconsistent with past decisions of the California Supreme Court and may have profound negative impacts in the Delta and statewide. ~~Commissioners asked that the matter be agendized to determine if the Commission should support a friend of the court brief. Since that time, the Supreme Court has decided to hear the case thus there is no need to submit a brief. The Commission may authorize submittal of a friend of the court brief on the merits of the case. Such a brief must be submitted in the next 30 to 60 days.~~

Commissioner Nottoli said that at a discussion of the same matter at a meeting of the Sacramento Area Flood Control Agency, some of the property owners from Sutter County expressed their concern about other public agencies intervening in the process. Mr. Frank said he was not familiar with Sutter County's arguments, but DPC participation would not speed up or slow down Supreme Court consideration, and the decision imposed liability on the government agencies to the benefit of the landowners; such a strict liability basis is a very troublesome legal standard. The Supreme Court uses a "rule of reason".

Chairman McCarty said the Commission had wanted to act to urge Supreme Court consideration of the case. The issue now is if the Commission wants to file a friend of the court brief with the Supreme Court. Mr. Frank said the purpose of such a filing is to submit to the Court a "fresh perspective". He said the Commission is a land use agency, and has a different perspective than reclamation districts, and the ruling could impact the ability of land use agencies making policy decisions.

Commission Potter outlined options: Mr. Frank prepares a brief and brings it back to the Commission; the Commission directs Mr. Frank to submit a brief; or the Commission gives Mr. Frank issues to include in a brief.

Commissioner Potter moved that Mr. Frank prepare a draft brief for Commission consideration at the next meeting; seconded by Commissioner Yates. The motion was approved on a voice vote.

9. Continued Public Hearing and Possible Action on the Submittal of the City of Rio Vista.

Chairman McCarty said the Commission opened the public hearing at the last meeting; there were no public comments and no written comments have been received. Chairman McCarty asked for public comments; there were none. Chairman McCarty closed the public hearing.

Ms Aramburu reviewed the City's proposal regarding lands in the Primary Zone in the City boundaries when the Act was adopted and an additional 500 acres that were in the process of being annexed for a new sewage treatment plant; a Final EIR had already been adopted for the proposed sewage treatment plant. She said the Plan directs Cities with lands in the Primary Zone to keep in place zoning and land use designations that were in place as of January 1, 1992. The City proposes a general plan amendments to ensure that future General Plan amendments be consistent with the Delta Commission's adopted Plan. She said staff is prepared to recommend approval of the City's submittal.

Commissioner Thomson moved adoption of the staff recommendation; seconded by Commissioner Torlakson. The motion was approved unanimous by roll call vote, 12-0-0.

10. Public Hearing on the Submittal of Sacramento County.

Chairman McCarty stated this is a public hearing on the submittal of Sacramento County.

Ms Aramburu said Sacramento County submitted material last summer and additional material in the fall. She said that with the current submittal, the County's submittal appears complete. The County staff has added a component which will reference the Commission's Plan in the County's General Plan, adding it to a list of "other plans" which must be considered in analysis of a new project or a General Plan amendment. She introduced Mike Winter of the County Planning Department staff, and she thanked Mr. Winter and other members of the staff for their cooperation.

Mike Winter said he would be glad to answer questions and updated the Commission on the status of County actions on the proposed General Plan amendments. He said the Board would probably act on the General Plan amendment at the end of July.

Ms Aramburu noted there have been no letters received on this submittal.

Chairman McCarty opened the public hearing; there were no speakers. He noted the public hearing would remain open until the next meeting. There were no Commissioner comments.

11. Commission Workshop on Proposed Regulation and Proposed Amendment to the "Land Use and Resource Management Plan for the Primary Zone of the Delta" (Plan) Addressing Siting of Sewage Treatment Plants and Areas for Disposal of Sewage Effluent and Sewage Sludge.

Chairman McCarty said the Commission held three public hearings on the proposed regulation and amendment. The workshop is to allow the Commission an opportunity to review and discuss the comments received in the public hearings and give staff directions. ~~This is not a public hearing and no Commission action is scheduled.~~

Ms Aramburu updated the Commission on a couple of related items: first, on April 18, the State Water Resources Control Board acted on an appeal of the General Order for sludge placement on agricultural lands. The General Order greatly simplified permitting for placement of sludge. The appeal was filed by Central Delta Water Agency, South Delta Water Agency, and State Farm Bureau. The State Board focused on CEQA issues and determined that a full Environmental Impact Report should have been prepared before the general orders were issued. The general orders are no longer in effect which means that each application to apply sludge must be individually reviewed and approved individually by the Regional Board. The Board "grandfathered" notices of intent that were received as of April 1, 1996; staff indicates that there may be one application in the Delta not yet processed. She said she researched the Regional Board's files and found that four NOIs had been submitted and approved;

sludge has been placed on one of the sites. In addition, a bill, SB 1723, which would have further regulated placement of sludge on certain sensitive areas, has been put aside. Hearings may be held in the fall to discuss the need for such legislation in the future.

She noted the packet included the letters received on the proposed regulation and the staff report includes a list of the materials which were not mailed to the Commission, but which are available in the Commission's offices. The staff report summarizes and groups the comments received at the hearings and by mail.

Chairman McCarty asked, through the Chair, that Jerry Meral of the Planning and Conservation League present background and comments on PCL correspondence received by the Commission at the last meeting.

Jerry Meral noted that he had met with the Executive Director and legal counsel regarding the letter, and was asked to give background and the views on this matter. He noted that he formerly worked at the Department of Water Resources and is currently the director of the Planning and Conservation League, with about 10,000 members and representing about 150 conservation groups. He said PCL was one of the strongest supporters of the legislation that created the Commission, has supported the Commission throughout its history, believes it is a very fine body and is doing a good job.

He said on this matter, PCL believes the Commission is headed in the wrong direction. First, the Commission is proposing to regulate in an environmental area; the Commission is a land use control body, but in this regulation the Commission is proposing to regulate pollutants, or material viewed as pollutants, namely sewage effluent, and biosolids or sewage sludge. ~~PCL's view is that kind of regulation should be based on~~ science. An agency without scientific staff or expertise should not adopt regulations that are precise, for example dealing with feet from groundwater, feet from a flood plain, etc. To give the public confidence in environmental regulation, the regulations must be based on scientific research and evidence. PCL has its doubts that the proposed regulation is based on detailed scientific review. This is not to say that environmental regulations by the EPA, by the State Board, by the Regional Board, by County Health Departments, are in every instance based on detailed scientific research. But they do carry out scientific investigations and they have on their staffs hydrologists, biologists, medical staff, etc. that carry out the scientific research needed to develop this type of regulation. PCL is concerned about

the Commission entering into regulation of this type of material, and that the Commission is asserting a pollution control authority. PCL doubts the Commission has that authority. In addition, the Commission does not have staff, consultants or scientific advisors to assist in adoption of this type of regulation. PCL has no problem with citizen bodies adopting regulations based on good science, but that assumes a scientific staff; in this case, there is none.

If the Commission has concerns, it would seem appropriate to contract with an independent outside authority or a state agency to do scientific research in this area, or it might be appropriate to ask CAL EPA to set up a special task force to look at these matters. Another option would be to work with Senator Johnston and call upon the California Research Bureau, part of the State Library, to address issues like this. Failing that kind of research, PCL believes the Commission should not enter into such a tricky area of regulation. Sludge is not of greater concern than a wide variety of contaminants that exist in the Delta today.

PCL is concerned because they want the public to be confident in the ways that pollution is regulated; the day the public loses confidence, all the State's programs will be suspect. PCL feels science is not being relied on. In addition, if the Commission takes action to ban biosolids, others may follow, and this material must go somewhere. We can no longer dump it into the ocean and we now recycle wastewater rather than dump it into the ocean. The alternative is to put the sludge into a landfill, and virtually every one of which will leak some time in the future. PCL believes disposal at agronomic rates is not inappropriate, so PCL urges that use be considered.

~~Chairman McCarty asked if the rest of the regulatory agencies~~ have, based on good science, banned the use of this material on food crops, wouldn't it seem reasonable to restrict that use in the Delta where the primary focus is on food crops, because of the need of the Commission to protect the viability of agriculture in the Delta? Mr. Meral asked if the assumption is that every acre in the Delta could some day be used for food crops, because the long-term persistence of the material, at least as a risk element, is certainly not proven. To follow existing regulations and say we don't want this on food crops is acceptable, but has already been done by the regulatory agencies. If the concern is that by applying it to land that may some day be used to grow food crops, that is an argument against applying it anywhere in the State, because that's probably true of most agricultural land in the State. Extending the ban without good scientific reason from food crops to non-food crops, strikes PCL as "the leap of non-faith".

Commissioner Potter said he had worked with Mr. Meral, and noted that Mr. Meral knows a lot about the Delta. In the western Delta where there are lands below sea level, peat soils, and areas subject to flooding if a levee breaks or a pump goes out, the Commission believes this is not the right setting for biosolids. He noted the probability of contact with the major water supply for most of the people of the State is significantly higher in the Delta than other areas of the State. He said no Commissioner made a general attack on the agricultural use of biosolids, but it is the Commissioners' belief that the Delta is not the appropriate place for its use. He asked for Mr. Meral's reaction. Mr. Meral said his understanding is that biosolids are not generally used on peat soils, peat soils are generally those soils below sea level, but the proposed regulation applies to the entire Primary Zone regardless if it was below sea level or not, or if it was on peat soils or not. Perhaps the Commission would be on stronger scientific ground if it used peat soil as a criteria; an argument might be presented that peat soils are more susceptible to contamination. Regarding possible contamination of the water supply due to flooding, the Commission may want to present a scientific case for regulation that at any given time the amount of sludge on a particular island susceptible to flooding should be below that which would contaminate the Delta waters; that might be an area of regulation of which PCL would be supportive. On the other hand, Senator Johnston's bill was opposed by the Association of California Water Agencies on issues of balance. The regulation could say we don't want any one island to have more sludge than would contaminate the neighboring rivers if flooded.

Commissioner Potter asked if Mr. Meral had reviewed the Commission's Plan and if there were any other areas of concern to PCL; Mr. Meral said the Plan is going in the right direction, and agreed that ~~it is critical to keep development out of the Primary Zone.~~

Ms Aramburu noted that the question had been asked at the last meeting about the percent of the solid waste stream that biosolids represent; Linda Novick of Bio Gro advised staff that the biosolids make up approximately, but less than, one percent.

Mr. Frank noted that the Staff Report includes a section entitled Legal/Technical. Those comments can be summarized in four basic concerns: the proposed regulation is beyond the Commission's jurisdiction; that there is a constitutional problem with the regulation; the procedures by which the Commission initiated the proceedings are not in conformance with the State Administrative Procedure Act, and the proceedings are not in conformance with the

California Environmental Quality Act. The Attorney General's office will be working to develop detailed responses to those comments. At this point, the Attorney General's office respectfully disagrees with those comments that the Commission lacks authority, and the process does not appear defective.

Ms Aramburu added that due to the detailed and lengthy nature of the public comments, it will probably take additional time for staff to prepare complete responses to comments submitted so the Commission vote may not be until June or July.

Ms Aramburu read a statement from Commissioner Mello, who could not attend:

Fellow Commissioners, In regards to P-3 of Utilities and Infrastructure, I propose language along these lines: Expansion of current sewage treatment facilities or new facilities for sewage treatment to service development in the Primary Zone that is consistent with the regional land use plan as defined by the Delta Protection Commission should be allowed. These facilities would allow the unincorporated towns in the Primary Zone to grow in order to accommodate future residential development contiguous to those towns. New sewage treatment facilities would not be allowed for any "new town" type of development. I propose no other changes in P-3. I would appreciate your consideration of this concept and hope the Commission will incorporate this change into P-3 of Utilities and Infrastructure. I apologize for my absence.

Commissioner Nottoli concurred and said that there was a discussion of this issue when P-3 was originally considered, particularly regarding the Courtland and Walnut Grove communities. He asked that staff research the original discussion of the issue by the Commission. He recalled there were some assurances at the time that such improvements would be acceptable.

Commissioner Salmon said the Commission has been told that certain agencies will perform a "watch dog" function; he is concerned that there are currently violations of State regulations, such as the City of Stockton's treated wastewater, which are being allowed by the State agencies. He is concerned there is inadequate State supervision of regulated activities. In addition, the City of Stockton was considering taking on processing of additional sewage from other areas-Lathrop, Manteca, and Gold Rush City, even though the City cannot adequately

treat its sewage to the current requirements. Commissioner Salmon said if there are not adequate regulations to address these concerns, the south Delta is in trouble from proposed development in the communities surrounding the south Delta looking for places to put effluent. He noted the State and federal water project pumps are also located in the South Delta. He said it doesn't make good sense to allow sludge in this area.

Commissioner Nottoli asked Commissioner Salmon if he does not have confidence that the regulatory agencies will adequately regulate these activities-disposal of effluent or placement of sludge; Commissioner Salmon concurred.

Chairman McCarty said it is important to look back to the Act which created the Commission; the mission and objective is land use; land use issues pertaining to agriculture, wildlife habitat, and recreation. The ability of the land and resources associated with the land to support these uses over time begs the question of science and goes to the heart of the matter. He said the science is not clear, it could come down on either side, but but the Commission's mandate is clear--to protect the resources for the long term. That is what the Plan is about, what the elements of the Plan area about, the proposed regulation is just one element of that overall program, but one that is critical.

Chairman McCarty asked staff to go back and look at P-3 and study the issue of alternatives or some alternative directions and bring that back to the Commission to consider.

Commissioner Nottoli asked about the timeline of actions; Chairman ~~McCarty said the timeline should remain open, pending additional staff~~ input, and final action would be later in the summer.

Commissioner Potter asked that a status report be included on the upcoming agendas.

Ms Aramburu noted staff would pursue responding to comments and also pursue some additional approaches for the Commission to discuss at the next meeting.

12. Commissioner Comments.

Commissioner Potter noted that he had met with Senator Johnston regarding SB 900 and how it would relate to Delta levees; there may be a need to convene the Levees Subcommittee. Chairman McCarty agreed.

Chairman McCarty congratulated Supervisors Thomson and Torlakson on their recent elections.

13. Adjourn.

The meeting was adjourned at 8:20 p.m.